STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE FREEMAN, JR.,

Defendant-Appellant.

UNPUBLISHED
April 29, 1997

No. 173896
Recorder's Court
LC No. 93-009137

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, and first-degree felony murder, MCL 750.316; MSA 28.548. He was sentenced to concurrent sentences of natural life in prison on both counts. We affirm in part and reverse in part.

On appeal, defendant argues that error requiring reversal occurred when the prosecutor questioned defendant regarding whether he disclosed information relating to the case to the police. Generally, the credibility of a witness may be attacked by showing that he failed to speak or act when it would have been natural to do so if the facts were in accordance with his testimony. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). However, the Due Process Clause of the Fourteenth Amendment prohibits the use of defendant's post-arrest, post-*Miranda*[1] warnings silence to impeach a defendant's exculpatory story at trial. *People v Allen*, 201 Mich App 98, 102; 505 NW2d 869 (1993). Post-arrest silence is of no probative value because it "may be nothing more than the arrestee's exercise of these *Miranda* rights." *People v Sutton (After Remand)*, 436 Mich 575, 593; 464 NW2d 276 (1990).

In the instant case, the record is unclear regarding whether and, if so, when defendant received *Miranda* warnings. The use of a defendant's pre-*Miranda* silence for impeachment purposes is constitutionally permissible. *People v Cetlinski (After Remand)*, 435 Mich 742, 746-747; 460 NW2d 534 (1990). Moreover, defendant did not remain silent following his arrest. Rather, he sent a letter to the prosecutor and asked his attorney to tell the police about the murder weapons. Finally, the

challenged exchange did not suggest to the jury that defendant refused to speak with the police in the face of accusation or that his silence was in reliance on *Miranda* warnings. When asked why he never spoke to the police directly, defendant responded that he "was not questioned by the police at all." Thus, the jury never learned that defendant refused to make a statement following his arrest.

Next, defendant argues that the prosecutor should not have allowed defendant to withdraw a motion for a mistrial against the advice of counsel without questioning defendant more thoroughly regarding his decision. According to defendant, the trial court should have complied with the procedure required when a defendant wishes to proceed in pro per.

Michigan has established stringent requirements before a defendant may be allowed to waive his right to counsel and proceed pro se. See *People v Dennany*, 445 Mich 412, 431; 519 NW2d 128 (1994). However, defendant did not waive his right to counsel in the instant case. Rather, he merely wished to proceed against his attorney's advice with regard to the motion for a mistrial. Proceeding against the advice of counsel is not tantamount to waiving counsel. See, e.g., *Stano v Dugger*, 921 F2d 1125, 1146-1147 (CA 11, 1991); *United States v Moody*, 763 F Supp 589, 606-607 (MD Ga, 1991), aff'd 977 F2d 1420 (CA 11, 1992); *Crowe v Georgia*, 458 SE2d 799, 805 (Georgia Sup, 1995); *Reed v Indiana*, 379 NE2d 977, 979-980 (Indiana Sup, 1978).

Defendant next contends that error requiring reversal occurred when the trial judge told the jury that defendant "blurted out" information in violation of a pretrial order entered in defendant's presence. We have examined the record and determined that the instruction did not unduly influence the jury so as to deprive defendant of a fair and impartial trial. *People v Sharbnow*, 174 Mich App 94, 99; 435 NW2d 772 (1989).

While not raised as an issue on appeal, defendant's convictions of both first-degree premeditated murder and first-degree felony murder constitute multiple punishment for the same offense in violation of the federal and state Double Jeopardy Clauses. The Double Jeopardy Clauses of the Michigan and United States Constitutions provide protection against multiple punishments for the same offense. *People v White*, 212 Mich App 298, 305; 536 NW2d 876 (1995). Where a defendant has been convicted of both first-degree premeditated murder and first-degree felony murder based on a single killing, the defendant's right against double jeopardy is violated. See, e.g., *People v Passeno*, 195 Mich App 91, 95-96; 489 NW2d 152 (1992); *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990). Accordingly, we vacate defendant's felony-murder conviction.

Affirmed in part and reversed in part.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).